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4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA  
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8 KAMARIO SMITH,

Case No. 2:14-cv-01021-GMN-NJK

9 Petitioner,

10 v.

ORDER

11 WARDEN RENEE BAKER, et al.,

12 Respondents.

13 This is a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254  
14 filed by a Nevada state prisoner. The petition was filed on June 23, 2014, (ECF No. 1),  
15 and on October 21, 2014, the Court directed respondents to answer or otherwise respond.  
16 On December 5, 2015, respondents filed an answer. (ECF No. 9). Petitioner's reply was  
17 due to be filed no later than January 20, 2015.

18 Instead of filing a reply, petitioner moved for leave to supplement his petition and  
19 to dismiss. Petitioner also filed a motion to amend his motion to dismiss, which the Court  
20 construed as a motion to amend the petition. On September 28, 2015, the Court denied  
21 petitioner's motions and directed petitioner to file any reply to the answer no later than  
22 October 28, 2015. Petitioner did not do so.

23 Nearly a year after the deadline to file a reply had expired, petitioner filed a motion  
24 to amend his petition and/or to stay and abey. (ECF Nos. 33 & 34). Respondents have  
25 opposed (ECF No. 36), and petitioner has replied (ECF No. 39). In addition, respondents  
26 have filed a motion to substitute (ECF No. 40), and petitioner has filed a motion for judicial  
27 action (ECF No. 41).  
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1 As an initial matter, the respondents' motion to substitute will be granted. Warden  
2 Renee Baker will be substituted in place and stead of respondent Dwight Neven.

3 Turning to petitioner's motion to amend and/or stay, petitioner indicates in his reply  
4 that he is not at this time seeking to amend his petition but instead is seeking only a stay;  
5 petitioner indicates he would like to exhaust his new claims in state court before amending  
6 the petition. (ECF No. 39 at 2).

7 The petition in this case is fully exhausted. The Court has discretion to stay a fully  
8 exhausted petition to allow the petitioner to exhaust claims that are not part of the petition.  
9 See *King v. Ryan*, 564 F.3d 1133, 1140-41 (9th Cir. 2009). A stay of this type does not  
10 require a showing of good cause. *Id.* at 1140. There is no indication on the record that  
11 petitioner would be in a worse position if he waits to amend his petition until after his  
12 return from state court. Whether he amends the petition now or whether he amends it  
13 later, the claims will likely have to relate back to the claims in his original petition in order  
14 to be considered timely. See *Mayle v. Felix*, 545 U.S. 644, 659 (2005). While it appears  
15 that many of the new claims petitioner seeks to exhaust are untimely, at least some of the  
16 claims could potentially relate back to claims in the original petition. Accordingly, the  
17 Court concludes, in its discretion, that a stay of the petition to allow petitioner to exhaust  
18 his proposed new claims is appropriate. This action will therefore be stayed and  
19 administratively closed pending the exhaustion of the new claims in state court.

20 Several months after filing the motion to stay, petitioner filed a motion for judicial  
21 action on his petition. (ECF No. 41). Petitioner asserts that the Court has not taken any  
22 action on his petition, including ordering an answer from the respondents. This latter  
23 assertion is not true, as respondents have filed their answer pursuant to court order.  
24 However, the motion does not mention the pending motions to stay and abey and to  
25 amend. It is therefore unclear if petitioner is abandoning or withdrawing those motions  
26 and would prefer to proceed to a determination of his original petition on the merits. To  
27 the extent that petitioner no longer wishes to return to state court to exhaust his new  
28 claims and would instead prefer to proceed his pending petition, petitioner may file a

1 motion to reopen this action within thirty days of this Court's order. Petitioner may at the  
2 same time submit a new reply, if he so chooses, as the reply that is on the record (ECF  
3 No. 38) does not appear to respond to the answer and rather responds only to  
4 respondents' opposition to the motion to amend and/or stay. If petitioner does not submit  
5 a new reply at the time of filing any motion to reopen, the Court will proceed to decide the  
6 petition on the pleadings presently before the Court. The motion for judicial action will  
7 therefore be denied without prejudice.

8 In accordance with the foregoing, IT IS THEREFORE ORDERED:

- 9 1. Respondents' motion to substitute (ECF No. 40) is GRANTED. Warden Renee  
10 Baker is hereby substituted in place and stead of respondent Dwight Neven;
- 11 2. Petitioner's motion to stay (ECF No. 34) is GRANTED. Proceedings on this  
12 petition are hereby STAYED, and this action shall be ADMINISTRATIVELY  
13 CLOSED pending a motion to reopen;
- 14 3. Petitioner's motion to amend (ECF No. 33) is DENIED WITHOUT PREJUDICE to  
15 renew upon his return from state court;
- 16 4. Petitioner's motion for judicial action (ECF No. 41) is DENIED WITHOUT  
17 PREJUDICE; and
- 18 5. Should petitioner no longer wish to return to state court to exhaust his new claims,  
19 petitioner may file a motion to reopen this action within thirty days of this Court's  
20 order. Petitioner may submit a new reply at the same time, if he so chooses.

21 DATED THIS 30<sup>th</sup> day of November 2017.

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24 GLORIA M. NAVARRO  
25 UNITED STATES DISTRICT JUDGE  
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